Supreme Court, U.S.
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No. 99-1987

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ANGELICA ROSE PALANK,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THE FEDERAL QUESTION WAS PROPERLY RAISED AND PRESERVED.

Respondent's argument that the federal question was not properly preserved is mistaken as to both the record and Florida jurisdictional law. The claims of federal constitutional protection were repeatedly and assiduously preserved at all available levels.

A. The Trial Court.

In the trial court, petitioner repeatedly and unsuccessfully objected on federal constitutional grounds to evidence and argument presented by respondent concerning (i) lawful maintenance-of-way-personnel reductions throughout CSX's multi-state system, and (ii) cost savings resulting from such reductions. See, *e.g.*, Tr. 981-85:

> "[Counsel for petitioner]: . . . And also we have raised the Gore case, the most recent United States Supreme Court case dealing with punitive damages, which discusses there is no liability for lawful conduct, and it has a limitation to geographic area, and they are talking about a system wide situation . . . .
>
> "THE COURT: . . . [A]re you telling me that the 2.4 billion dollars was saved as a result of cutting—downsizing only maintenance people?
>
> "[Counsel for respondent]: Yes, sir. . . .
>
> "[Counsel for respondent]: That's our theory of the case. They can argue against it, and we can argue for it. . . .
>
> "THE COURT: I said you can mention the 2.4 billion . . . ."

See also, *e.g.*, Tr. 8399 ("the constitutional concerns that we brought to Your Honor's attention during our motion to strike, which the U.S. Supreme Court has said one state does not have authority to punish an individual defendant for

conduct that is lawful outside the state"), 13687 (citing *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), as basis for mistrial because of argument based on out-of-state personnel reductions). Pp. 3a-8a, *infra*. See also petitioner's Trial Memorandum, p. 11a, *infra*:

> "The due process clause is also pertinent . . . . [T]he Supreme Court's most recent pronouncement, in *BMW* v. *Gore*, sets geographic limits on punitive damages and holds that lawful conduct cannot be punished."

Petitioner also sought specific jury instructions to preclude the jury from considering lawful out-of-state conduct in setting punitive damages. See petitioner's Memorandum, pp. 14a-16a, *infra*; Proposed Jury Instructions, pp. 17a-18a, *infra* ("You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in lawful conduct that takes place in states outside the State of Florida," citing *BMW* (to the opinion's specific discussion of this issue) and *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)). The requested instructions were denied. P. 17a, *infra*.[1]

Petitioner repeatedly invoked this Court's *BMW* opinion as precluding punishment of lawful out-of-state conduct. *BMW* cited both Due Process Clause and Commerce Clause decisions in concluding: "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." 517 U.S. at 573. In addition to citing *BMW*, petitioner also cited the Due Process Clause, and also expressly argued, p. 16a, *infra*, that

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[1] The assertion in the Brief in Opposition that "the court rejected CSX's request as untimely," Br. Opp. 4, 10, is flatly incorrect. Respondent cites for this assertion Tr. 13843, but that is a colloquy concerning an entirely different instruction. Even as to that instruction, the trial court's ruling was not based on timeliness. See Tr. 13844, p. 9a, *infra*.

> "unless Defendant's proposed instructions are used, the punitive damages award will run afoul of the interstate commerce clause in the U.S. Constitution and principles of state sovereignty and comity, which limits a state's power to punish a defendant for conduct outside its borders."

In post-trial motions petitioner once again argued that the trial court had unconstitutionally allowed the jury to consider lawful out-of-state personnel reductions in its punitive-damage deliberations, and had allowed the jury to award punitive damages to deter lawful out-of-state conduct. Petitioner again cited *BMW*, "the Due Process Clause," and "federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation." Pp. 20a-22a, *infra*.[2]

B. The District Court of Appeal.

Petitioner renewed all its constitutional arguments on appeal to the Florida District Court of Appeal. Contrary to the implication of the Brief in Opposition, at 5, petitioner's constitutional claims were by no means confined to a single footnote. Rather, petitioner's brief devoted several pages of argument to these issues and repeatedly cited *BMW*. See pp. 23a-27a, *infra*. Petitioner unambiguously argued for reversal because the jury had not been instructed that it "should only consider Florida's interest in protecting its own citizens and

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[2] Respondent's argument, Br. Opp. 10, that the constitutional claim was waived by not presenting it until the jury instructions on punitive damages is unsupported by any authority, factually inaccurate and legally incorrect. First, the constitutional claims, as noted, had been raised throughout the trial. Second, even if they had not been, the proposed jury instructions were a timely and appropriate way to raise the federal question, as were the post-trial motions, and no Florida court held otherwise or adopted respondent's unsupported argument of waiver. Indeed, even if they had, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923); *James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984).

economy" and that it "should not award money to deter defendant's lawful conduct outside Florida's borders." *Id.*, 24a, see also *id.*, 27a ("attack of lawful conduct far outside the borders of Florida" was "in clear violation of *Gore*'s proscription"). It specified in a footnote that one of the bases for these textual arguments was federal constraints "prohibiting states from unduly burdening interstate commerce." *Id.*, 25a n.39.

C. The Florida Supreme Court.

Respondent's argument that the federal claims should have been presented to the Supreme Court of Florida, Br. Opp. 1, 6-8, rests on a misunderstanding of Florida law. Those issues were not presented to that court because it had no jurisdiction, discretionary or otherwise, to review them.

Because, as respondent acknowledges, Br. Opp. 12, the District Court of Appeal's opinion did not discuss the constitutional claims urged by petitioner, under the applicable Florida jurisdictional provisions the Florida Supreme Court could review those issues only upon certification by the District Court of Appeal that it had decided "a question . . . of great public importance." Fla. R. App. P. 9.030(a)(2)(A)(v).

Petitioner timely sought such certification of the question whether "constitutional requirements as reflected in *BMW of North America, Inc. V. Gore*, 517 U.S. 559 (1996) were violated" by allowing evidence of the system-wide personnel reductions and denying the proposed instruction prohibiting punitive damages for lawful conduct outside Florida. P. 28a, *infra*. Petitioner's motion for certification was denied without opinion. Pet. Cert. App. 17a.

Respondent is quite correct that petitioner's subsequent application to the Supreme Court of Florida for discretionary review, which was based on state-law issues as to which that court did have discretionary jurisdiction, did not include the federal constitutional claims. See Pet. Cert. 7 & n.4. But

respondent's observation is entirely irrelevant. Review of the federal claims in the Supreme Court of Florida, even discretionary review, was jurisdictionally precluded by the District Court of Appeal's denial of certification and its failure "expressly" to explain its ruling on the constitutional issues. See Fla. R. App. P. 9.030(a)(2)(A)(ii), (v); *Florida Star* v. *B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988); *Jenkins* v. *State*, 385 So. 2d 1356 (Fla. 1980).[3] Hence by seeking certification petitioner exhausted all the review of federal claims that was available in the Florida courts, and fully satisfied the jurisdictional requirements of 28 U.S.C. § 1257, as this Court has recognized in similar cases. *Cf., e.g., Ibanez* v. *Florida Dep't*, 512 U.S. 136, 142 (1994)("the District Court of Appeal . . . affirmed the Board's final order *per curiam* without opinion. . . . As a result, Ibanez had no right of review in the Florida Supreme Court"); *Palmore* v. *Sidoti*, 466 U.S. 429, 431 (1984)("The Second District Court of Appeal affirmed without opinion . . . thus denying the Florida Supreme Court jurisdiction to review the case"); see also *Florida Star, supra.*

D. Pertinent Decisions.

Respondent's argument seems to amount to a complaint that although petitioner repeatedly cited the *BMW* case, and also cited due process and Commerce Clause protections in both the trial court and the District Court of Appeal, it should have done so more often and always mentioned all three. But the long-established rule is that

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor

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[3] Fla. R. App. P. 9.030(a)(2)(A)(ii) provides for Supreme Court review of decisions that "expressly construe a provision of the state or federal constitution;" however, because (as respondent acknowledges, Br. Opp. 12) the District Court of Appeal's opinion here provided no such express construction, that section did not apply. See also *Grate* v. *State*, 750 So. 2d 625, 626 (Fla. 1999).

> be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Street v. *New York*, 394 U.S. 576, 584 (1969), quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)(footnote omitted); see also *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85 n.9 (1980); *cf. Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)("[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected"). Indeed, given the clarity of the constitutional principle established in *BMW*, resting on requirements of both due process and the Commerce Clause, petitioner's citations to that case as prohibiting punishment of lawful extraterritorial conduct ought by themselves to have sufficed. But petitioner cited the constitutional provisions themselves as well. Moreover, this Court has explained that extraterritorial application of state impositions on interstate business may violate either Due Process Clause or Commerce Clause protections, or both, and that invoking one includes the other as well. *Braniff Airways, Inc.* v. *Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954). Similarly, this Court's discussion in *BMW* did not seek to distinguish between them. See 517 U.S. at 571-73 and cases cited; *cf. Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Petitioner's invocation of the federal constitutional protection recognized in *BMW* was unambiguous, unrelenting, and adequate.

II. CERTIORARI IS APPROPRIATE.

1. Respondent asserts that "the [out-of-state personnel] reductions were not themselves the grounds for imposition of punitive damages." Br. Opp. 11. But that assertion is utterly belied by the record. Over petitioner's repeated objections, and rejecting petitioner's proposed instructions, the jury was

permitted to make out-of-state lawful conduct the basis for the largest punitive verdict in Florida history. It was emphatically urged by respondent to do exactly that.[4] As respondent's counsel told the trial court, "That's our theory of the case. They can argue against it, and we can argue for it." P. 6a, *infra*. "This is our entire case." *Id.*, 4a.[5]

2. Respondent correctly notes that the Florida court rejected petitioner's constitutional claims "with no discussion at all." Br. Opp. 12. That has never precluded this Court's review of properly preserved Federal claims; with regularity this Court reviews even appellate decisions issued with no opinion. *E.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989). Here, of course, the same District Court of Appeal had just

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[4] See, in addition to excerpts from respondent's argument quoted at Pet. Cert. 3-4, Tr. 13964-65:

> "So what is the proper punitive damage verdict to deter this conduct and to stop it and to have these folks say look, even though we made 2.4 billion or actually 3.3 billion as of '93. . . . What is it that's going to cause them to say that is not a good idea even though we are making these enormous profits, we have to stop that, we have to put on enough people to make this work."

Tr. 13967-68:

> "The punitive damage verdict in this case, not just from the greater weight of the evidence, but from the overwhelming clear and convincing weight of the evidence, certainly should be not—should not be less than one year's ill gotten gains, should not be less than 275 million. 275 million would be a little bit over 10 percent of the 2.4 billion dollars in ill gotten gains from '81 to '93."

[5] Respondent until now acknowledged and vigorously defended such measuring of punitive damages by petitioner's system-wide personnel reductions. *E.g.*, Plaintiffs' Response to Defendant's Memorandum Regarding Punitive Damages, Cir. Ct., at 19-21; Memorandum in Response to Memorandum Supporting Post-Trial Motions, Cir. Ct., at 38-40; Motion for Entry of Judgment, Cir. Ct., at 63-65; Answer Brief of Appellees, Dist. Ct. App., at 8, 53 & n.9; Appellees' Response to Appellant's Motion for Certification, Dist. Ct. App., at 8-10.

rejected the same federal claims with a full opinion four months earlier. *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603 (Fla. App. 1998), *approved*, 749 So. 2d 483 (Fla. 1999) (cited at Pet. Cert. App. 12a). Thus it had already explained its views of *BMW*, and how federal constitutional law is to be applied in Florida.[6] There certainly is not a scintilla of support in the record for respondent's speculation that it "appears" to respondent that the court omitted discussion "probably because the issue had not been preserved." Br. Opp. 10, 12.

3. The extraterritorial personnel reductions on which respondent's punitive claim was based were not conduct unlawful in every state. In fact, respondent presented no evidence that they were unlawful in *any* state. As the *amicus* demonstrates, the operating policies of interstate railroads, including their personnel policies, are the subject of longstanding federal regulation. Far from being unlawful, the reductions implemented the Congressional decision to deregulate and enhance efficiency in the railroad industry. See AAR Br. 11-14; Pet. Cert. 14-15.

4. Respondent's suggestion that the Tenth Circuit has somehow abandoned its constitutional position in *Continental Trend Resources*, see Br. Opp. 12-13, is incorrect. The recent Tenth Circuit decision cited by respondent emphatically restates the very argument of this petition:

> "In *BMW*, the defendant was assessed punitive damages for activities in other states, which were explicitly legal in those states. By punishing behavior in other states which those states had made a legislative decision to permit, Alabama reached beyond its own zone of legitimate interests and encroached on the sovereign interests of other states."

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[6] Indeed, respondent argued to the court that "In OWENS-CORNING FIBERGLAS CORP. v. BALLARD . . . this Court answered the question for purposes of this case . . . ." Answer Brief of Appellees, Fla. Dist. Ct. App., at 53 n.9.

Smith v. *Ingersoll-Rand Co.*, 214 F.3d 1235, 1253 (10th Cir. 2000). *Smith* involved *unlawful* conduct in other states, admissible *only* for the limited purpose of proving notice and reprehensibility.[7]

5. None of the cases respondent cites supports the Florida holding of punishment for lawful extraterritorial conduct. *Ex parte LifeUSA Ins. Co.*, 2000 Ala. Lexis 159 (Ala. 2000), addressed simply discovery issues as to unlawful conduct in another state relevant to reprehensibility; *cf. Schaffer* v. *Edward D. Jones & Co.*, 552 N.W.2d 801, 813 n.19 (S.D. 1996)(out-of-state conduct admissible as to reprehensibility). *Walston* v. *Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996), also concerned plainly unlawful conduct, as did *Owens-Corning* v. *Thompson*, 2000 WL 764930 (Tex. App. 2000) (unlawful conduct in other states admissible because plaintiff worked there).[8]

6. Respondent's argument that the conflict should be ignored because this decision was not issued by the Supreme Court of Florida, Br. Opp. 12, ignores that court's *Owens-Corning* decision. The dissenting Justice in that case pointed out that "[t]he punitive damage issues in this case are significant and have major public policy ramifications," and concluded that "[w]e have no more authority to impose punitive damages in this case than we have to impose a criminal sentence for a crime that occurred in the state of

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[7] Moreover, this Court has specifically noted as an open question "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State." *BMW* v. *Gore*, 517 U.S. at 573 n.20 (emphasis in original).

[8] See also *Jimenez* v. *Chrysler Corp.*, 74 F. Supp. 2d 548, 582 (D.S.C. 1999) ("Chrysler's conduct would be considered unlawful under the products liability law of every state"). In two of the cases cited by respondent, no evidence of out-of-state conduct had been admitted at trial. See *Parsons* v. *First Investors Corp.*, 122 F.3d 525, 531 n.2 (8th Cir. 1997); *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997).

Georgia." *Owens-Corning Fiberglas Corp.* v. *Ballard*, 749 So. 2d 483, 489-90 (Fla. (1999) (Overton, J., dissenting). Moreover, the Supreme Court of Florida itself has explained the limited nature of its jurisdiction, and that "under the constitutional plan" of Florida's revised constitution, "[i]t was never intended that the district courts of appeal should be intermediate courts." *Sanchez* v. *Wimpey*, 409 So. 2d 20, 21 (Fla. 1982); see also *Owens-Corning*, *supra*, 749 So. 2d at 485 n.3 ("we would discourage district courts from asking for this kind of check on its decision" by certification). And this Court with great frequency reviews decisions of state intermediate appellate courts.

7. Even if there were no conflict in the lower courts, it is plain that this Florida decision flatly violates this Court's clear command in *BMW* v. *Gore*. This is the second recent Florida decision to do so, and imposes an immense punishment on an interstate railroad for lawful extraterritorial conduct. It is significant to the national economy and utterly at variance with decisions of this Court going back at least to *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). That is reason enough to grant certiorari.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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ADDENDA

ADDENDUM A

Florida Rule of Appellate Procedure 9.030 provides in relevant part (footnotes omitted):

Rule 9.030. Jurisdiction of Courts

(a) Jurisdiction of Supreme Court.

(1) *Appeal Jurisdiction.*

(A) The supreme court shall review, by appeal

(i) final orders of courts imposing sentences of death;

(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(B) If provided by general law, the supreme court shall review

(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;

(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(2) *Discretionary Jurisdiction.* The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court, and

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

(3) *Original Jurisdiction.* The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction, and may issue writs of mandamus and quo warranto to state officers and state agencies. The supreme court or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

* * *

ADDENDUM B

IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

Case No. 92-22407 13

ANGELICA ROSE PALANK, as Personal Representative of the Estate of PAUL JOSEPH PALANK, Deceased; and surviving spouse of PAUL JOSEPH PALANK, Deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor, and JOSEF PAUL PALANK, a minor,

Plaintiffs,

vs.

CSX TRANSPORTATION, INC., a Foreign Corporation,

Defendant.

Hollywood, Florida

Transcript of Trial Proceedings

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* * *

[981] MR. JAMES [Counsel for petitioner]: The next point is the alleged 2.4 billion dollar savings. You did indicate a factual, and again I think it was the context of this, there would need to be factual predicates relative to this testimony. Our point is to get these figures in front of a jury in the liability phase of this bifurcated procedure would be

reversible error under the Grace case, because it still touches on the wealth of the parties. We could make a stipulation to the effect that one of the motives of downsizing was to save money, and certainly there we wouldn't have the problem of unfair prejudice outweighing probative value.

As the cases I gave you say, the Court should be more restrictive when in these questionable type areas on statements and things, it's better to err on the side of a greater restriction than too little. And also we have raised the Gore case, the most recent United States Supreme Court case dealing with punitive damages, which discusses there is no liability for lawful conduct, and it has a limitation to geographic area, and they are talking about a [982] system wide situation.

Finally, there is no link, and as the Court will recall from the chart we had before, to link this alleged saving to this accident and this switch and, in fact, as we showed you the facts are, this switch had quite a few inspections right up until 24 hours before the accident.

THE COURT: You told me you had more inspections.

MR. JAMES: I told you, I know, but my point is I made about six points why we don't believe that it's appropriate or proper for them to be mentioning this in the opening statement. This was just what we had done to assist the Court.

THE COURT: All right. Who wants to answer that?

MR. SEARCY [Counsel for respondent]: May I be heard on that, Your Honor?

THE COURT: Yes, sir.

MR. SEARCY: As the Court stated when this matter came up a couple of weeks ago, this is an issue for the jury. This is our entire case. It's based on the motive for the improper conduct. CSXT was saving enormous amounts of money by laying off maintenance of way employees [983] who were not revenue producers, they were not producing any revenue, they laid them off for costs. They made tremendous savings

by doing so. The savings were so great they more than paid for all the derailments, that ensured they more than paid for any claims or fines, they had a tremendous financial motive to do this.

The FRA did an audit of one of their divisions, the Baltimore division in 1987, and the finding of that audit was they did not have enough maintenance of way personnel to do the minimal safety inspections and maintenance required, and they made recommendations to CSXT that they put on more maintenance of way personnel to do this. That's in 1987 they are on notice of that, this happens in 1991.

The only way that the jury is going to be able to believe this conduct that is so deplorable is to understand the motive and the motive was to cut back on employees—

THE COURT: Mr. Searcy, are you telling me that the 2.4 billion dollars was saved as a result of cutting—downsizing only maintenance people?

MR. SEARCY: Yes, sir, and that's testified [984] to by Leland Case, transportation economist. He has a Ph.D. from Northwestern. He worked with the American Association of Railroads for ten years, and he has gone through the R-1's, which is the financial reporting

THE COURT: You are saying—

MR. SEARCY: Only on maintenance of way cutbacks.

THE COURT: You are saying something else there, you are saying the money they save well pays for the damages and all that stuff. How can you say that?

Let's assume, God forbid, there was a horrible accident and one thousand people were not killed but injured very badly. That's a big swallow. I don't know I am going to let you say that in opening statement.

MR. SEARCY: Doesn't that go to the weight?

THE COURT: Who says that?

MR. SEARCY: That's our argument.

THE COURT: You are wrong there because it's argument.

MR. SEARCY: That's our theory of the case. They can argue against it, and we can argue for it. If we were limited on opening statement to [985] what they admitted, we wouldn't be able to give an opening statement.

THE COURT: That sounds like argument to me.

MR. SEARCY: I don't intend to make any argument, but we do need to present our theory of the case, Your Honor.

THE COURT: You do. You say they saved 2.4 billion, I may allow that, but you better tie that up because if you don't, you will be in trouble.

MR. SEARCY: There was mention of the Gore case, that has nothing to do with this case, that was a case involving sales—

THE COURT: I said you can mention the 2.4 billion, but I don't think I am going to allow you to say that the money they saved they were so cavalier that they knew it would cover—unless you have somebody to say that, and I don't think you do, that's argument, that's the end of that issue.

MR. JAMES: We—note our exception on that, and I have Grace—

THE COURT: As far as the instructions, I generally, not generally, I assiduously follow the standards. I don't go past the standards [986] unless there is a real reason for it. I haven't read the standards, but if the standards cover it, I'm not going to give in addition outside the standards, that's my general policy.

* * *

[8398] MR. BALLAINE [Counsel for petitioner]:—they put on a witness who has obviously testified for a couple of days and was cross examined at length. You will recall we actually did move to strike after, and Your Honor denied that motion. But I think that's important context because before you go into these individual questions, we ask Your Honor to consider again our position that his testimony in that deposition is irrelevant or at least highly prejudicial and subject to exclusion under 403, [8399] and raises the

constitutional concerns that we brought to Your Honor's attention during our motion to strike, which the U.S. Supreme Court has said one state does not have authority to punish an individual defendant for conduct that is lawful outside the state.

With that background, I just want to remind Your Honor of what we are talking about here with this testimony. The entire purport of Mr. Case's testimony is 2.4 billion dollars of savings from CSX or predecessors from 1981 through 1993, from cutbacks. On its face obviously cutbacks are perfectly lawful. Their position is cutbacks are not perfectly lawful if what you are doing is throwing safety to the wind as a result. All this case is about, and the only evidence that's at all relevant to this jury is were there cutbacks that affected safety in the Florence division, that's all we are talking about.

But we know from Mr. Case's testimony from the first time, that his 2.4 billion does not concern cutbacks that necessarily have anything to do with the Florence division. Your Honor will recall that his own testimony was under cross-examination which they don't want to put in [8400] now that, in fact, CSX only was created in about 1986. And so in order to get figures from before 1986, he basically traced back to every corporation, railroad corporation that, that existed from 1981 on that ultimately became part of the CSX family of corporations. And those individual railroads included lots of companies that had nothing to do with the Florence division whatsoever at anytime. And if there was a cutback by that railroad, it couldn't possibly have anything to do with what's going on here.

Mr. Case also made clear that even when we are talking about the 2.4 billion dollars, we are not even talking about real money. Your Honor will recall he felt like it was important to adjust the money to 1987 dollars. I can't imagine why that would be relevant. If nothing else, their argument ought to be here is actually how many dollars were actually saved, but that's not how they put on their case.

* * *

[13687] THE COURT: Motion for mistrial denied.

MR. FLEMING [Counsel for petitioner]: For the record, I may not have made it clear when I referenced the Gore case, that talks about wrong to persons outside of the state, in this case Florida. Certainly the ones Mr. Searcy referred to, even the ones involved in this accident, many of which were actually located outside the state of Florida, it's clearly improper argument. I know he read the case.

MR. SEARCY: I have read it, but I'm not sure you have. Gore has nothing to do with that. Gore was a case against the Volkswagen—or BMW people. They had cars that they would dent before they sold new and fix them and repaint [13688] them and sell them new and not tell anybody it was dented and repainted. And this dentist found out and sued for punitive damages in Alabama, and there were some states that had a statute that specifically allowed the automotive plaintiff to do that as long as the damage was below a specific amount. And so they said it's not proper to argue all 50 states on the amount of damages on this punitive damage for violation of this statute when some of those 50 states specifically allowed the conduct.

That's got absolutely nothing to do with this case. My arguments on this case, Your Honor, were appropriate with regard to other individuals. They brought up look at all the other people that were hurt and they all had lawsuits, and maybe they got six million dollars.

THE COURT: All right. All right. All right. Enough. Come on, let's go home. I will see you all Monday at 11:00.

* * *

[13842] THE COURT: Relative to the instructions.

MR. SEARCY: The Defendants submitted.

MR. BARNHART [Counsel for respondent]: We—I have them, we object to them.

THE COURT: How about the one that they asked for clear and convincing evidence, that's the one you wanted.

MR. BARNHART: I didn't see their jury instruction form. Which one is that, Bill?

MR. BALLAINE: Obviously all we are doing is protecting the entire record that the entire case was supposed to be submitted on clear and convincing evidence.

MR. BARNHART: We just got it.

THE COURT: I just got them, too, and I read them. I don't understand. [13843]

MR. BALLAINE: So the record is clear, we didn't mean to suggest the jury should have a clear and convincing standard for this phase. We want to make sure the record was clear from the outset we thought the clear and convincing should go to the jury.

MR. BARNHART: We may go along with clear and convincing at this stage going to the jury.

MR. BALLAINE: We object to the special interrogatories.

THE COURT: You object to that. You withdraw this instruction first, you give me an instruction to give to the jury.

MR. BALLAINE: All we are doing—the instruction we gave you greater weight of the evidence because we acknowledged that is what the patterned jury instructions requires. All we want to do is protect our position, which has indicated Your Honor from the outset that—

THE COURT: You want clear and convincing evidence in phase one, you don't want it just for phase two.

MR. BALLAINE: Absolutely not.

THE COURT: This instruction you gave me for phase two really doesn't apply to phase two. [13844]

MR. BALLAINE: That's correct, per se.

THE COURT: Enough, enough. You are not getting it, so don't worry about it.

* * *

ADDENDUM C

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed Feb. 11, 1997]

DEFENDANT'S TRIAL MEMORANDUM
REGARDING PUNITIVE DAMAGES

Defendant CSX TRANSPORTATION, INC. ("CSXT"), files this memorandum to assist the Court in adjudicating the substantive and evidentiary issues presented in this trial as to whether plaintiffs are entitled to recover punitive damages against CSXT.

* * *

[10] a. *Evidence of Pre-Accident Conduct*

The standard for considering evidence in the punishment phase is defined in Florida law as being the potential for harm, by a measure of probability, rather than a hindsight analysis based on actual harm.

> The seriousness of the *probable result* of the defendant's conduct, then, is the yardstick for determining the advisability of discouraging such behavior in the future, rather than the seriousness of the damage actually caused.

Levine v. Knowles, 197 So.2d 329, 331 (Fla. 3d DCA 1967).

In the entitlement phase, plaintiffs must prove evil intent and evil conduct that proximately caused the plaintiffs' damages. Temporally, the conduct at issue necessarily predates the injury, because the jury is considering whether to punish CSXT for allowing the accident to happen. The nature of the conduct that is admissible is what (a) can be

shown to be linked to the accident and (b) has a factual component -- not mere argument -- of wrongdoing rising to the manslaughter standard. As to what type of conduct is relevant, a key evidentiary ruling relates to plaintiffs' "motive" argument, by which they intend to admit evidence at [*sic*] the cost-savings realized by CSXT, across the board, in a decade of reductions in force and increased mechanizations. *BMW v. Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996) holds that lawful conduct, and conduct unrelated to the place of injury, are not properly considered in assessing punitive damages. Of course, unless and until any amount of punitive damages is being assessed, evidence of any party's wealth is inadmissible. Evidence that CSXT reaped billions of dollars in savings is not only irrelevant and prejudicial, but runs afoul of *BMW v. Gore* and *W.R. Grace*'s expressed policy.

* * *

[20] *CONSTITUTIONAL IMPLICATIONS OF PUNITIVE DAMAGES*

Punitive damages awards and federal constitutional issues are most closely associated in the realm of excessiveness; i.e., whether awards of certain magnitude violate the due process clause of the fourteenth amendment. The due process clause is also pertinent to the liability phase of this trial, however, insofar as fundamental fairness is at stake. As noted above, the Supreme Court's most recent pronouncement, in *BMW v. Gore*, sets geographic limits on punitive damages and holds that lawful conduct cannot be punished. To the extent plaintiffs seek to hold CSXT liable for lawful business decisions, serious due process objections arise.

The United States Supreme Court has, on three different occasions, reviewed punitive damages awards. In *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991) the court reviewed an Alabama punitive damages

award, in an amount approximately four times the amount of compensatory damages, which was asserted to be so excessive as to violate due process. Alabama provided for post-verdict "reasonableness" review by the trial and appellate courts. The court affirmed the award, holding that review for reasonableness, together with adequate guidance by the court when the case is tried to the jury, were sufficient to make the proceeding fundamentally fair. In terms of substantive due process, a 4-to-1 ratio was close to the line but did not cross the line into constitutional impropriety.

In a second case, *TKO* [*sic*] *Production Corp. v. Alliance Resources Group*, 509 U.S. 443, 113 S.Ct. 2711 (1993), the court also acknowledged a constitutional right to be free of excessive [21] punitive damages awards; however, it declined to formulate a test to determine excessiveness. Presumably persuaded by the evidence of intentionally mean-spirited and harmful conduct, a plurality of the court held that the $10 million award—against a potential harm to plaintiff estimated at $1 milliondid not "jar one's constitutional sensibilities."

The court finally implemented the acknowledged right to be free of a grossly excessive punitive damages award in *BMW v. Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996). BMW had been found liable for $4 million in punitive damages for its policy of not disclosing presale repairs to its vehicles which did not exceed three percent of the sales price. The jury awarded the single plaintiff in the case $4,000 in compensatory damages. The majority opinion makes several important contributions to the law on punitive damages. It held that such awards must be keyed to an identified interest at the forum state, an[d] a defendant cannot be punished for conduct that does not offend those interests. Moreover, a defendant cannot be punished for lawful conduct. Assessing the award against these standards, it was found grossly excessive and violative of due process. The court set three "guideposts" for lower courts assessing reasonableness: (1)

the degree of reprehensibility of the misconduct; (2) the disparity between the harm or potential harm to plaintiff and the award; and (3) the difference between this remedy and civil penalties imposed in comparable cases. These guideposts are an admonition to trial courts to scrutinize punitive damages.

* * *

ADDENDUM D

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed July 29, 1997]

DEFENDANT CSX TRANSPORTATION, INC.'S MEMORANDUM IN CONNECTION WITH ITS SUBMISSION OF JURY INSTRUCTIONS AND PROPOSED SPECIAL VERDICT FORM FOR STAGE TWO OF PUNITIVE DAMAGE TRIAL

Defendant, CSX TRANSPORTATION, INC. ("CSXT"), respectfully submits this Memorandum of Law in Connection With its Submission of Jury Instructions and Proposed Special Verdict Form for Stage Two of Punitive Damage Trial.

[2] *Introduction*

This memorandum is respectfully submitted to briefly address certain constitutional issues relevant to the Court's consideration of what jury instructions and verdict form should be given to the jury at the end of stage two of this punitive damage trial.[1]

Constitutional Concerns
Relevant To Stage Two

Federal and state courts have repeatedly had occasion in recent years to address the many constitutional implications of a punitive damage claim. *See, e.g., Honda v. Oberg*, 512 U.S. 124, 129 (1994)(punitive damages is an exercise of state power that must comply with due process); *BMW of North*

[1] Defendant respectfully refers the Court to its prior submission addressing, among other things, constitutional concerns specifically applicable to stage one.

America v. Gore, 116 S.Ct. 1589 (1996) (addressing due process constraints on a state court punitive damage verdict); *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443 (1993) (reaffirming existence of substantive due process protection against excessive punitive damages); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (focusing on procedural due process issues in the face of vague jury instructions); *Browning Ferris Indus. of Vermont v. Kelco Disposal Co.*, 492 U.S. 1 (1989)(discussing punitive damage awards in context of Eighth Amendment (excessive fines clause) and the Fifth and Fourteenth Amendments (due process clauses)); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1995) (discussing due process considerations in punitive damage cases, including a defendant's [3] right to reasonably-articulated legal standards); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996) (addressing implication of due process clause and interstate commerce clause). *See also BMW of North America v. Gore* 116 S.Ct. at 1607 (Breyer, J. concurring) (addressing equal protection implications of any state law that provides "an open-ended basis for inflating the award when the defendant is wealthy," but not against less pecunious defendants); *TXO Prod. Corp.*, 509 U.S. at 472-501, (O'Connor, J., dissenting)(questioning verdict where defendant's great wealth stressed).

Particularly, given the understandably strong emotional sympathies favoring Plaintiffs and the evidence admitted, over objection, concerning Defendant's enormous size and financial resources and its purported "system-wide" wrongs, reaching far beyond the immediate issues concerning the defective switchstand, and the fact that the jury will hear about Defendant's multi-billion dollar net worth, but not be told that Amtrak, rather than CSX Transportation Inc., will bear the financial brunt of the jury's "punishment," this case raises grave implications under both the United States and

Florida Constitutions.[2] Defendant submits that if this Court permits the jury to be charged pursuant to the Florida's Standard Jury Instructions covering stage two of a bifurcated trial, without giving the additional instructions and the special verdict form being submitted by Defendant, any resulting punitive damage award would violate the Fifth and Sixth Amendments, as well as the Due Process and Equal Protection Clauses of the Fourteenth [4] Amendment of the United States Constitution, because, among other things, the Plaintiffs would be allowed to secure a substantive punitive damage award against a large corporation based on constitutionally inadequate standards; and it would violate the excessive fines clause of the Eighth Amendment to the United States Constitution in that any award of such damages, without proper standards, would constitute an imposition of excessive and unreasonable fines. And for much the same reasons, the award of punitive damages would violate substantially similar provisions in the Florida Constitution, specifically Article I, Section 2 (Basic Rights), Article I, Section 9 (Due Process), Article I, Section 17 (Excessive Punishments), and Article I, Section 21 (Access to Courts) of the Florida Constitution. Finally, unless Defendant's proposed instructions are used, the punitive damages award will run afoul of the interstate commerce clause in the U.S. Constitution and principles of state sovereignty and comity, which limits a state's power to punish a defendant for conduct outside its borders. *See, e.g., BMW of North America v. Gore*, 116 S.Ct. at 1597-1598; *Continental Trend v. OXY USA, Inc.*, 101 F.3d at 637-638.

* * *

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[2] Constitutional provisions implicated include the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2 (Basic Rights), Article I, Section 9 (Due Process), Article I, Section 17 (Excessive Punishments), and Article I, Section 21 (Access to Courts) of the Floriida Constitution.

ADDENDUM E

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed July 29, 1997]

Court Exhibit No. 15
Denied by Court

DEFENDANT'S NOTICE OF FILING OF PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM FOR SECOND STAGE OF BIFURCATED TRIAL OF PUNITIVE DAMAGES

Without waiving its rights, Defendant, CSX TRANSPORTATION, INC., hereby gives notice of filing proposed jury instructions and a special verdict form for the second stage of the bifurcated trial of Plaintiffs' punitive damage claim (the "Instructions").

* * *

NO. 8
CONDUCT OUTSIDE STATE
SPECIAL INSTRUCTION

In considering what amount to award as punitive damages, you should restrict your consideration to Florida's interest in protecting its own citizens and its own economy.

Authorities:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 (1996)

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F. 3d 634, 637 (10th Cir. 1996)

* * *

NO. 9
CONDUCT OUTSIDE STATE
SPECIAL INSTRUCTION

You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in lawful conduct that takes place in states outside the State of Florida.

Authorities:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 and 1598 n.20 (1996)

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 637 (10th Cir. 1996)

NO. 10
CONDUCT OUTSIDE STATE
SPECIAL INSTRUCTION

You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in conduct, whether it be lawful or unlawful, that takes place in states outside the State of Florida.

Authorities:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 and 1598 n. 20 (1996)

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F. 3d 634, 637 (10th Cir. 1996)

* * *

ADDENDUM F

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed Aug. 26, 1997]

CORRECTED

DEFENDANT, CSX TRANSPORTATION, INC.'S MEMORANDUM SUPPORTING ITS MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT REMITTITUR AND NEW TRIAL AND OPPOSING PLAINTIFF'S MOTION FOR JUDGMENT EXCEEDING FLORIDA'S STATUTORY CAP ON PUNITIVE DAMAGES

* * *

[29] 3. *Constitutional Constraints*

The Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits a state from imposing a grossly excessive punishment on a tortfeasor and thus fixes a substantive limit on the sustainable size of a punitive damage award. *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 1592 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189 (Fla. 3d DCA 1997).[33]

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[33] This discussion focuses on the United States Constitution but defendant has contended that analogous provisions in the Florida Constitution are equally applicable. *See, e.g., Langmead*, 1997 WL 244910. CSXT also contends that the Eighth Amendment, like the Due Process Clause, similarly requires rejection of the $50 million punitive damage award in this case. *See, Browning v.* [*sic*] *Ferris Ind. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (and dissenting opinion of Justice O'Connor at 492 U.S. at 282-300).

Given the merits of CSXT's statutory and common law rights to a substantial remittitur, plaintiffs' superficial analysis of the implications of Supreme Court case law requires only a relatively brief response.

Under *Gore*, 116 S. Ct. 1589, the Supreme Court recently established three guideposts for assessing whether an award is constitutionally excessive under the Due Process Clause: (1) degree of reprehensibility of the conduct; (2) ratio of punitive damages to compensatory damages; and (3) the difference between the civil punitive damage remedy and any available civil penalties. *Gore*, 116 S. Ct. at 1598-1599. But the Supreme Court did more. *Gore* also instructed that the state may only consider that state's interest in protecting its own citizens and its own economy, rather than purporting to act for citizens (or in this case, the travelling public) anywhere in the United States. *Gore*, 116 S. Ct. at 1597. *Gore* further directed that a state cannot impose punitive damages to deter lawful conduct outside that state, and indeed, *Gore* has [30] since been read to prohibit a state punitive damage award intended to inhibit *unlawful* conduct outside the state's own borders. *Gore*, 116 S. Ct. at 1597; *Continental Trend Resources, Inc.*, 101 F.3d 634, 636-637 (10th Cir. 1996)(citing *Gore*, 116 S. Ct. at 1598 n.20 and n.21). *Gore* further warned that a defendant's wealth does not alone justify a large punishment by a state, or any punishment at all, particularly where the defendant is an active participant in the national economy. *Gore*, 116 S. Ct. at 1594. *See Continental Trend*, 101 F.3d at 641. And *Gore* stressed that the most important factor in determining an appropriate award is the degree of reprehensibility of the defendant's conduct. *Gore*, 116 S. Ct. at 1599.[34]

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[34] CSXT submitted proposed jury instructions for phase two of the trial covering each of the *Gore* directives discussed above. All were rejected by this court.

The $50 million award was plainly influenced by plaintiffs' unfounded charges that a $5 billion railroad, operating throughout the East Cost, had to be punished and deterred because of "wrongful" cutbacks throughout its system, which had supposedly yielded $2.4 billion in "ill-gotten gains." *See* Appendix B. Personnel cutbacks by CSXT and its predecessors over an entire decade in states up and down the Eastern seaboard went far beyond Florida's legitimate interests in this case. Yet these cutbacks became the excuse for plaintiffs to urge the jury to award a wildly-excessive $275 to 550 million, resulting in the jury's compromise figure of "only" $50 million. To permit such an inflated verdict to stand would totally ignore the teaching of *Gore*.

* * *

[44] Similarly, it was error to limit the jury in phase two to the brief, vague legal guidance contained in the standard instructions. The jury also should have been instructed, as defendant requested, that punitive damages cannot be awarded to give plaintiffs additional damages; that the jury should only consider Florida's interest in protecting its *own* citizens and economy (not the travelling public anywhere); that the jury should not award money to deter future conduct, whether lawful *or* unlawful, outside is borders; and that a defendant's wealth does not justify a large punishment, or indeed, any punishment at all. All these requested instructions were consistent with the dictates of *Gore*, 116 S. Ct. at 1597-1604, and necessary given the evidence and plaintiffs' arguments to the jury. *See also Continental Trend*, 101 F.3d at 636-637, 641. Indeed, the jury also should have received further guidance—requested by defendant—on what specific factors to consider in determining an amount to award, so that the jury would properly understand that wealth *is not* an important factor and that, instead, the jury needed to focus on [45] the existence or degree of reprehensible misconduct *beyond* that which minimally justifies a punitive

damage award—*i.e.*, conduct such as malice or willful misconduct causing injuries over a protracted period of time. *See, e.g., Gore*, 116 S. Ct. at 1599-1604; *Mattison*, 947 F.2d at 110. *See also, Arab Termite & Pest Control of Fla., Inc.*, 409 So. 2d at 1043; *St. Regis Paper Co.*, 428 So. 2d at 246 and 248; *Bankers Multiple Line Ins. Co.*, 464 So. 2d at 533. Instead, however, the jury was left to fend for itself under standard instructions that were far too cryptic and vague to meet the important task at hand. *Compare Standard Jury Instructions*, 689 So. 2d 1042 (Florida's standard punitive damage instructions) *with Mattison*, 947 F.2d at 109-110 (setting forth required jury instructions concerning the amount to award).[46] The court's decision to adhere to the inadequate standard instructions, and go no further, was prejudicial error.

* * *

[46] Defendant contends that the failure to give the additional requested instructions violated not only Due Process, but also defendant's Equal Protection rights under the United States Constitution. *See, e.g., Mattison*, 947 F.2d at 101 n.3. The jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 116 S.Ct. at 1604.

ADDENDUM G

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

DISTRICT COURT OF APPEAL CASE NO. 97-3798

CSX TRANSPORTATION, INC.,
Appellant,

vs.

ANGELICA ROSE PALANK, as personal representative of the Estate of PAUL JOSEPH PALANK Deceased; and Surviving Spouse of PAUL JOSEPH PALANK, Deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor, and JOSEF PAUL PALANK, a minor.
Appellees.

[Filed June 29, 1998]

INITIAL BRIEF OF APPELLANT

* * *

[23] At the conclusion of both the liability and damages phases, the court again ignored its judicial responsibilities by refusing to give needed special instructions to the jury and by insisting that standard form instructions were basically all that was needed. When plaintiff suggested to the jury in argument that gross negligence would provide a sufficient basis for punitive damage liability—contrary to clear Florida law—the court refused to do anything about it. Then, in the damage phase, the court refused to give instructions incorporating the U.S. Supreme Court's holdings in *BMW of North America Inc. v. Gore*, 517 U.S. 559 (1996). That omission allowed the

jury to punish CSXT for lawful conduct in other states as to which Florida has no legitimate regulatory interest, in clear contravention of *Gore*.

* * *

[33] Moreover, there was no evidence that there was anything remotely unlawful about the manpower reductions made by railroads across the Eastern seaboard throughout the 1980's. To make this conduct the prime justification for demanding huge punitive damages from CSXT, therefore, violates the teaching of *Gore*, in which the U.S. Supreme Court instructed that constitutional restraints prohibit one state from imposing punitive damages in order to deter a defendant from engaging in lawful conduct in other states. *Gore*, 517 U.S. at 572-74.

By erroneously allowing plaintiff to go forward with this terribly prejudicial and (at best) misleading proof, the trial court allowed plaintiff's counsel to poison the jury's consideration of the liability issues. The liability trial should not have been about a purported $2.4 billion in "savings" or "profit," about CSXT's size or wealth, or about punishing big businesses. Yet plaintiff was improperly allowed to taint the trial with this evidence and argument.

* * *

[42] Finally, it was error to limit the jury in the damage phase to the legal guidance contained in the Standard Jury Instructions. The jury also should have been instructed as defendant requested (*see* CX15), that (1) punitive damages are not intended to give plaintiffs extra damages; (2) the jury should only consider Florida's interest in protecting its own citizens and economy; (3) the jury should not award money to deter defendant's lawful conduct outside Florida's borders; (4) a defendant's wealth does not justify a large punishment, or any punishment at all; and (5) conduct reprehensible enough to give rise to tort liability, even to a modest punitive

damage award, does not establish the high degree of culpability that warrants a substantial punitive damage award. All these requested instructions were consistent with the dictates of *Gore*, 517 U.S. at 571-586, and necessary given the evidence and plaintiffs' arguments to the jury. *See also Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 636-637, 641 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997). The jury also should have received further guidance (as defendant requested) on what specific factors to consider in determining an amount to award, so that the jury would properly focus, not on defendant's wealth, but whether CSXT's misconduct went well *beyond* that which minimally justifies a punitive damage award, *i.e.*, conduct such as malice or willful misconduct causing injuries over a protracted period of time. *See, e.g., Gore*, 517 U.S. at 576-586; *Mattison*, 947 F.2d at 110. *See also, Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982), *rev. denied*, 434 So. 2d 887 (Fla. [43] 1983); *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 246, 248 (Fla. 1983); *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 533 (Fla. 1985).

Instead, the jury was left to fend for itself under standard instructions that were not sufficiently illuminating to meet the important task at hand. *Compare Standard Jury Instructions*, 689 So. 2d 1042 (Florida's standard punitive damage instructions) *with Mattison*, 947 F.2d at 109-110 (setting forth required jury instructions concerning the amount to award).[39]

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[39] The failure to give the additional requested instructions violated not only Due Process, but also defendant's Equal Protection rights under the United States Constitution. *See, e.g., Mattison*, 947 F.2d at 101 n.3. The jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 517 U.S. at 585.

[48] *Constitutional Constraints*

The Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits a state from imposing a grossly excessive punishment on a tort feasor and thus fixes a substantive limit on the sustainable size of a punitive damage award. *Gore*, 517 U.S. at 562; *Honda Motor Co.*, 512 U.S. at 420; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189, 1191 (Fla. 3d DCA 1997).[45] Given the merits of CSXT's statutory and common law rights to a substantial remittitur, plaintiffs' $50 million must be remitted under § 768.73, *Fla. Stat.*, or run afoul of constitutional restraints.

Under *Gore*, the United States Supreme Court established three guideposts for assessing whether an award is constitutionally excessive under the Due Process Clause: (1) degree of reprehensibility of the conduct; (2) ratio of punitive damages to compensatory damages; and (3) the difference between the civil punitive damage remedy and any available civil penalties. *Gore*, 517 U.S. at 575. The Supreme Court also limited a state to consider that state's interest in protecting its own citizens and its own economy, rather than purporting to act for citizens, or in this case, the traveling public, anywhere in the United States. *See Gore*, 517 U.S. at 571-73. The Supreme Court further prohibited a state from imposing punitive damages to deter lawful conduct outside that state. *See Gore*, 517 U.S. at 572-73. *Gore* further

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[45] This discussion focuses on the Untied States Constitution but defendant submits that analogous provisions in the Florida Constitution are equally applicable. *See, e.g., Langmead*, 696 So. 2d at 1191. CSXT also contends that the Eighth Amendment, like the Due Process Clause and Equal Protection Clause, similarly requires rejection of the $50 million punitive damage award in this case. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)(and dissenting opinion of Justice O'Connor at 492 U.S. at 282-300).

warned that a defendant's wealth does not alone justify a large punishment by a state, or any punishment at all, particularly where the defendant is an active participant in the national economy. *See Gore*, 517 U.S. at 585. *See also Continental Trend*, 101 F.3d at 641. Moreover, *Gore* stressed that [49] the most important factor in determining an appropriate award is the degree of reprehensibility of the defendant's conduct. *See Gore*, 517 U.S. at 575.[46]

The $50 million award was plainly influenced by plaintiffs' completely unfounded charge that at least $2.4 billion had flowed into CSXT's coffers at the expense of public safety. All plaintiff actually showed was that CSXT and many other railroads had made personnel cutbacks in their operations over the course of many years, beginning in 1981, *not* that all of these cutbacks had an adverse effect on safety over that protracted period of time. Plaintiff's case thus relied on an attack of lawful conduct far outside the borders of Florida and far beyond Florida's legitimate interests in *this* case—in clear violation of *Gore*'s proscription.

* * *

[46] CSXT submitted proposed jury instructions for the damage phase covering each of the *Gore* directives discussed above. (CX15) All were rejected by the trial court.

ADDENDUM H

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

[Title Omitted in Printing]

[Filed Sept. 9, 1999]

APPELLANT'S MOTION FOR CERTIFICATION

Appellant CSX Transportation, Inc. ("appellant" or "CSXT") respectfully moves for an order certifying that there are questions of great public importance that should be passed upon by the Florida Supreme Court. In support of the motion the appellant states:

* * *

[7] 12. Finally, this Court should certify as of great public importance the following constitutional issue:

> Whether a new trial is required on the grounds that constitutional requirements as reflected in *BMW of North America, Inc. V. Gore*, 517 U.S. 559 (1996) were violated when appellees introduced evidence in the liability phase of $2.4 billion in savings by CSXT based on a system-wide reduction in maintenance-of-way employees by CSXT, and its predecessors (*i.e.*, across the Eastern Seaboard), and when the trial court refused to instruct the jury in the damage phase that punitive damages should not be awarded to deter lawful conduct outside Florida's borders, and the jury should only consider Florida's interest in protecting its own citizens and economy, as well as that a defendant may not be punished solely for its wealth.

13. *Gore* clearly instructs that a state may not assess punitive damages to punish lawful conduct outside its borders. *Gore*, 517 U.S. at 572-74, 585. Nonetheless,

plaintiff was permitted to "prove" CSXT's liability for punitive damages through evidence attacking corporate down-sizing conduct taken by CSXT and its predecessor railroads all across the Eastern Seaboard, which allegedly yielded $2.4 billion in "savings" (described by plaintiffs' counsel to the jury as "ill-gotten gains"). Plaintiff did not (and could not) provide any evidence that this alleged "system-wide" conduct was illegal or tortious, let alone that it [8] adversely affected Florida interests. This highly prejudicial trial court ruling, and the plaintiffs' extravagant use of the ruling in phase one, violated the letter and spirit of *Gore*.

14. *Gore* also articulates basic constitutional constraints that should guide a state in assessing the amount to award for conduct warranting punitive damages. *Gore*, 517 U.S. at 572-85. Having violated *Gore* in the liability phase, the trial court compounded its *Gore* violation in the damages phase, by refusing to instruct the jury not to punish CSXT for lawful out-of-state conduct, and to consider only Florida's interests, as well as not to assess punitive damages based solely on corporate wealth. The court's failure to so instruct the jury this way was constitutional error. *See Gore*, 517 U.S. at 572-74. *Compare Ballard*, slip op. at 6, n.2.

15. Here too, these important issues were raised by appellant both in the trial court and in this Court, but were never addressed by either court in its ruling upholding an unprecedented $50 million award. These significant *Gore* issues also should be presented for the Florida Supreme Court's review in the context of this important case.

WHEREFORE the appellant respectfully moves the Court for an order certifying that the three above-specified questions are of great public importance and should be passed upon by the Florida Supreme Court.

* * *